

ISSUE DATE: March 6, 1998

DOCKET NO. P-421/EM-97-1830

ORDER REJECTING INTERCONNECTION AGREEMENT AND DIRECTING REFILING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
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Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Joint Petition of  
US WEST Communications, Inc. and  
Minnesota Southern Cellular for Approval of  
an Interconnection Agreement Between  
US WEST Communications, Inc. and  
Minnesota Southern Cellular for Service Under  
the Telecommunications Act of 1996, Section  
252(e)

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**PROCEDURAL HISTORY**

On December 29, 1997, US WEST Communications, Inc. (USWC) and Minnesota Southern Cellular (MSC) filed a joint request for approval of an Interconnection Agreement that was voluntarily negotiated between them.

On January 8, 1998, the Minnesota Department of Public Service (the Department) submitted its comments on the Agreement submitted by USWC and MSC (the Companies). The Department recommended rejection of the Agreement and proposed amended language for the parties' proposed Agreement.

On January 20, 1998, USWC submitted its reply comments disagreeing with the Department.

The Commission met on February 17, 1998 to consider this matter.

**FINDINGS AND CONCLUSIONS**

**I. THE COMPANIES' PROPOSED INTERCONNECTION AGREEMENT**

USWC and MSC 's Interconnection Agreement (Agreement) sets the terms, conditions and prices of reciprocal traffic exchange, network interconnection, access to unbundled network elements, and handling of other interconnection issues. The Agreement

- contains terms and conditions for Type 2 reciprocal traffic exchange and interconnection;
- specifies that separate agreements between the parties can be negotiated for collocation, ancillary services and access to operational support systems (OSS);

- contains various provisions covering warranties, dispute resolution, branding, notices, amendments and assignments;
- specifies the term of the Agreement, billing, payment, late payment charges, deposits, liability, taxes, indemnification and other general provisions;
- contains service standards and performance indicators for services provided to each party; and
- states that it shall be in effect for two years and will continue until the Parties have entered into a replacement agreement.

The Companies asserted that the Interconnection Agreement does not discriminate against any other telecommunications carrier and is consistent with the public interest, convenience and necessity. The Companies noted that the terms and conditions of the Interconnection Agreement are available to any other requesting telecommunications carrier according to Federal law to avoid claims of discrimination.

## **II. SUMMARY OF COMMISSION ANALYSIS AND ACTION**

The Federal Telecommunications Act of 1996 (the Act) permits telecommunications companies to negotiate an interconnection agreement with an incumbent local exchange carrier (ILEC) to interconnect with and use the incumbent's network for the purpose of providing competitive local exchange service. The Act specifies the Commission's role with respect to a negotiated agreement for the resale of local exchange service.

Because the interconnection agreement at hand was negotiated, the relevant portion of Section 252(e) states:

(e) Approval by State Commission.--

(1) Approval Required.--Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for Rejection.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) an agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity....

The Commission has reviewed the Companies' Agreement and finds that, for the most part, it is acceptable. The several issues raised by the Department warrant discussion, however, and in several instances the Commission agrees with the Department that identified portions of the

Companies' agreement must be modified. In addition, the Commission notes an additional concern regarding Section 23 - Amendments. As discussed below in Section IV (page 11 of this Order), the Commission finds that Section 23 of the agreement must be modified before the agreement can be approved.

Accordingly, the Commission will reject the Agreement as filed and direct the Companies to resubmit it, modified as indicated in this Order.

### **III. THE DEPARTMENT'S CONCERNS**

#### **A. Third Party Beneficiaries**

Section 21.22 of the Agreement states that there are no third-party beneficiaries to the contract.

The Department stated that the Commission required modifications to the Interconnection Agreement for US WEST New Vector and Duluth MSA (aka: Air Touch Cellular) in Docket No. P-421/M-97-793. The Department recalled that in that docket, the Commission required language replacing the "no third-party beneficiary" language with language that the Commission is a third-party beneficiary on behalf of the public. The Department recommended that the Commission reject the Agreement unless the language is modified as follows to be consistent with the approved docket:

Parties recognize the MPUC as a third-party beneficiary on behalf of the public. Accordingly, the parties agree to give notice to the Commission of any lawsuits or other proceedings that involve or arise under the agreement and further agree not to oppose any petitions by the Commission to intervene in any such proceedings on behalf of the public interest.

USWC disagreed with the Department's recommendation to change the Agreement language on third-party beneficiary. USWC stated that Minnesota contract law would not support the interpretation that the Commission is a third-party beneficiary of the Agreement or that the Commission could order such a result. In other negotiated interconnection agreements, USWC noted, the Commission has allowed language that would obligate the parties to notify the Commission of lawsuits or other proceedings arising under the agreement. USWC agreed to do the same in this Agreement but recommended that the Commission reject the Department's third-party beneficiary language.

The Commission agrees with USWC that in recent negotiated agreements the Commission has approved third-party language that simply requires notice to the Commission and has not required language that the Commission is a third-party beneficiary on behalf of the public. The following language was recently approved in the Access Network/USWC negotiated agreement in Docket No. P-5240,421/M-97-1180:

***Notwithstanding the foregoing, parties agree to give notice to the Public Utilities Commission (MPUC) of any lawsuits or other proceedings that involve or arise under the agreement to ensure the MPUC has the opportunity to seek to intervene in these proceedings on behalf of the public interest.***

The Commission finds that Section 21.22 as filed is contrary to the public interest because it fails to acknowledge the Commission's role on behalf of the public interest through the implementation of this interconnection agreement. Specifically, the Section in question fails to provide for notification to the Commission regarding any lawsuits and other proceedings involving or arising under the Companies' interconnection agreement. Therefore, the Commission will reject the Companies' proposed interconnection agreement as filed and direct them to refile the agreement incorporating language cited above from the Access Network/USWC negotiated agreement in Docket No. P-5240,421/M-97-1180 to correct the deficiency.

## **B. Amendments**

Section 21.25 of the Agreement would allow parties to amend the contract without obtaining Commission approval.

The Department noted that because interconnection agreements are available for adoption by others according to Section 252(i) of the Federal Act, confusion may arise whether a contract modified without Commission approval would be available for adoption. Therefore, the Department recommends the addition of the following language:

***Any amendment to this agreement shall be approved by the Minnesota Public Utilities Commission.***

USWC agreed to the modification recommended by the Department in other cases and agreed to make the change in this case also.

The Commission finds that failure of Section 21.25 (as filed) to clarify that any amendments to the interconnection agreement must be approved by the Commission is contrary to the public interest. The Commission, therefore, will reject the Interconnection Agreement as filed and require the Companies to adopt the language cited above, as recommended by the Department to correct the deficiency.

## **C. Reciprocal Traffic: Compensation for Paging**

Section 4.9.1 of the Agreement would obligate USWC to compensate for local 2-way voice traffic but not paging traffic.

The Department objected that USWC's refusal to compensate for paging traffic violates FCC's First Interconnection Order ¶ 1008 requiring LECs to enter into reciprocal compensation arrangements with Commercial Mobile Radio Service (CMRS) providers, including paging providers. The Department argued that because the FCC requires compensation arrangements with paging providers, USWC should not be allowed to exclude compensation for paging in the agreement with MSC. The Department argued that if MSC will be providing paging services, the language in Section 4.9.1 should be modified to state:

**USWC will compensate Carrier for local traffic, including paging traffic, originated from USWC's subscribers.**

The Department added that if MSC will not be providing paging services the reference to paging can simply be eliminated as was done in the St. Cloud Interconnection Agreement Docket No. P-421/EM-97-437.

USWC opposed the Department's recommendation to either include language that requires compensation for paging or to eliminate any reference to paging compensation in the Agreement. USWC explained that because this Agreement is for type 2 cellular interconnection, not paging, a separate contract would be used to for paging traffic compensation. USWC stated that the parties have chosen to not cover paging interconnection issues in the Agreement and noted that there continues to be national and industry debate on the issue of paging compensation. USWC requested that the Commission take notice of this unsettled issue and await for a definitive settlement of it on a national level.

The Commission agrees with the Department that USWC's refusal to compensate for paging traffic violates the FCC's Interconnection Order, ¶ 1008. That section of the Interconnection Order requires local exchange carriers (LECs)

... to enter reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks.

Accordingly, the Companies' proposed language will be rejected and the Commission will require adoption of the language changes proposed by the Department to correct the deficiency. This decision is consistent with the Commission's July 28, 1997 Order in Docket No. P-421/EM-97-437.<sup>1</sup>

If paging is not covered by this Agreement as stated by USWC, paging could be eliminated as was done in the St. Cloud Interconnection Agreement.

#### **D. Definitions: Local Calling Area**

Section 3.25 of the Agreement defines local calling area as follows:

*... a geographic area defined by the MTA within which Carrier provides CMRS services where local interconnection rates apply excluding roaming traffic as defined in FCC First Report and Order 96-325 47 CFR 51.705(b)(2).*

The Department stated that this definition may impact the assessment of access charges by USWC on intra-MTA (Major Trading Areas) calls. The Department noted that the FCC addressed this issue when it decided that intra-MTA traffic access charge arrangements made prior to enactment of the Federal Act should be allowed to continue. The Department recalled that, consistent with the FCC's decision, the Department in the AT&T Wireless/USWC arbitration case (Docket No. P-421/EM-97-371) did not support USWC proposed language that would impose access charges on such traffic unless it could be demonstrated that it was the parties' prior practice to do so. The Department recommended that since USWC was not able to demonstrate to the Commission that Intra-MTA interstate roaming calls were subject to access charges prior to passage of the Federal Act the Commission should require similar treatment and language changes in this case between USWC and MSC.

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<sup>1</sup> In the Matter of the Application for Approval of the Agreement for Interconnection and Traffic Interchange between Cellular Mobil Systems of St. Cloud, Minnesota L.L.P. and US WEST Communications, Inc., Docket No. P-421/EM-97-437, ORDER REJECTING CONTRACT (July 28, 1997) at page 7.

The Department argued further that the existing definition is confusing because it refers to a geographic area but then excludes roaming traffic from this area. The Department stated that such a definition cannot be represented on a map.

For these reasons, the Department recommended the following language modification as follows:

Local Calling Area - "a geographic area defined by the MTA within which Carrier provides CMRS services."

USWC asserted that the Department's proposed modification and reasoning were insufficient to justify rejection under the Federal Act. However, USWC accepted the modification in this case and in all future wireless interconnection cases in Minnesota and agreed to make the Department's recommended modification.

The Commission notes that it addressed this access charge issue in the AWS/USWC arbitration Order and also, more recently, in the Aerial/USWC interconnection Order.<sup>2</sup> In both Orders, the Commission interpreted the FCC's Order that pre-existing arrangements for access charges on interstate roaming traffic should continue. The Commission found that USWC had failed to prove that intra-MTA roaming traffic was subject to access charges prior to the FCC's Order. In those circumstances, the Commission concluded, USWC could not assess interstate or intrastate access charges on AWS for intra-MTA roaming traffic. Accordingly, the Commission ordered the definition of local calling area modified to read as follows:

***A geographic area defined by the MTA within which AWS provides CMRS services where local interconnection rates apply as defined in FCC First Report and Order 96-325 47 CFR 51.701(b)(2).***

The Commission continues to approve the rationale and result in these cited cases and will, therefore, reject Section 3.25 as proposed and direct the Companies to adopt similar language in their resubmitted interconnection agreement to correct the deficiency.

#### **E. Reciprocal Traffic Exchange: Non-Local Traffic**

The Department recommended that Section 4.3.4 defining non-local traffic be modified consistent with the Commission's Order in Docket No. P-421/EM-97-437 (St. Cloud Docket). According to the Department, the Agreement should adopt the language for "local telecommunications traffic" contained in FCC's Rule 47 C.F.R. 51.701(b)(2). Further, the Department stated that the parties should state the intent that the definition will be applied consistent with the FCC's Interconnection Order and the Federal Act §251(g). The Department explained that this change would clarify the treatment of access charges for roaming traffic in accordance with Federal law and the Commission's decision in the St. Cloud Docket.

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<sup>2</sup> In the Matter of the Petition of Aerial Communications, Inc. for Arbitration of an Interconnection Agreement With USWC Communications, Inc., Pursuant to 47 U.S.C. § 252, Docket No. P-421/EM-97-1337, ORDER DENYING RECONSIDERATION, APPROVING CONTRACT AS MODIFIED, AND REQUIRING FILING SUCH MODIFIED CONTRACT (February 27, 1998).

USWC agreed to accept the Department's recommended modification to Section 4.3.4 of the Agreement.

The Commission finds that the public interest requires adoption of the best (most recently approved) language. The Commission will reject the Companies' proposed agreement and direct them to file an agreement that includes the language as proposed by the Department to correct the deficiency.

#### **F. US WEST DEX Issues**

The Department stated that Section 11 of the Agreement addressing US WEST DEX does not adequately protect the public interest because it does not acknowledge the close relationship between USWC and US WEST DEX. The Department stated that the Act and the Commission's decision in the consolidated arbitration case recognized the importance of directory listings and yellow pages. The Department recommended that the Commission require the Companies in this case to adopt language consistent with what the Commission ordered in the Consolidated Arbitration Proceeding. The Department recalled that in the Commission's ORDER RESOLVING ARBITRATION ISSUES, issued December 2, 1996, the Commission required the following modifications to the Agreement in that case:

***US WEST is an affiliate of US WEST DEX. Given this status, US WEST will ensure that it is treated in a competitively neutral manner by US WEST DEX vis a vis the Carrier. If US WEST receives a commission from US WEST DEX for placement of yellow pages advertising, the Carrier shall receive the same commission. US WEST DEX will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example through some type of bidding process). If the Carrier is not given the same directory listing opportunity as US WEST, the Carrier shall receive a share of the revenues (based on the percentage of lines belonging to that Carrier in the particular list) that US WEST receives from US WEST DEX. US WEST shall make its contracts with US WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as US WEST.***

The Department recommended that the Commission reject the Agreement submitted by the Companies in this case and require inclusion of the language shown above.

USWC disagreed with the Department's recommended language modifications regarding US WEST DEX issues. USWC argued that Minnesota rules require that USWC provide a white page directory to all customers served by that directory along with information concerning emergency calls, placing local and long distance calls, and calls for repair and directory assistance. USWC explained that it contracts with US WEST DEX, an unregulated affiliate, to publish and distribute white pages directories in the areas it (USWC) serves. To satisfy the competitive checklist to reenter the long-distance market, USWC acknowledged that it must provide nondiscriminatory access to white pages directory listing for customers of other carrier's telephone exchange service. US WEST complies with Minnesota rules and the Federal Act.

USWC asserted, however, that neither Minnesota rules nor the Federal Act impose any obligations on USWC to publish or distribute Yellow Page directories and stated that it does not do so. Therefore, USWC argued, issues regarding US WEST DEX are not proper subjects



for Commission consideration of this negotiated Agreement. USWC stated that since the parties have voluntarily negotiated issues regarding US WEST DEX, the Commission should not impose a different result.

The Commission agrees with the Department that the language in the Agreement currently does not provide any guarantees or commitment on behalf of USWC that MSC will be treated competitively neutral with regard to US WEST DEX. As such, it violates the public interest and constitutes grounds to reject the contract.

The language adopted by the Commission in previous cases and recommended by the Department in this case recognizes the affiliate relationship between USWC and US WEST DEX and promotes the public interest need for MSC to receive the same treatment that USWC receives from US WEST DEX. The Commission approves and will require use of the language shown above to correct the deficiency.<sup>3</sup>

#### **G. Scope of Agreement: Acknowledgment of Deferred Issues**

Section 2.3.1 of the Agreement states that the Carrier (MSC) acknowledges that USWC believes it is entitled to receive additional compensation for costs of implement various provisions of the Federal Act and that it (USWC) intends to seek such additional relief in future state and/or federal proceedings.

The Department did not agree that USWC is entitled to additional compensation in the future. Further, the Department asserted that language is inappropriate and may be misleading to other Parties if allowed to remain in the Agreement. The Department recommended that this section be deleted from the Agreement, stating that this would be consistent with the Commission's rejection of such language in the Triad/USWC interconnection agreement.<sup>4</sup>

USWC opposed the Department's recommendation to strike Section 2.3.1 of the Agreement. USWC stated that in this section the parties simply acknowledge that certain issues currently pending before the FCC must be deferred for future resolution.

The Commission notes that the Department is concerned that this section might imply agreement by the Commission with USWC on these deferred issues. The Commission finds that the language of proposed Section 2.3.1 does not imply nor express that the Commission, MSC nor anyone else agrees with USWC that it (USWC) is entitled to additional compensation for costs of implementing the Federal Act. The parties have simply agreed to permit USWC to state its position on cost recovery and its intent to seek recovery in future proceedings. As such, Section 2.3.1 is neither contrary to the public interest nor discriminatory. The Commission will not reject it.

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<sup>3</sup> The Commission recently required a similar result in the Aerial/USWC Interconnection Order. See cite in Footnote 2.

<sup>4</sup> In the Matter of the Application for Approval of the Agreement for Interconnection and Traffic Interchange Between Triad Minnesota L.P. and US WEST Communications, Inc., Docket No. P-421/EM-97-488, ORDER REJECTING CONTRACT (July 28, 1997).

## **H. Miscellaneous Terms: Dispute Resolution**

Section 21.16 of the Agreement covers the procedure for dispute resolution between the parties. The Agreement as proposed states:

*The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof.*

The Department noted that this language has been modified by the Commission in other agreements. The Department cited, for example, the Commission's Order in the AT&T Wireless/USWC arbitration docket.<sup>5</sup> In that Order, the Commission required the following language:

*Subject to review by the Commission, the decision of the arbitrators shall be final and binding upon the Parties and judgement upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The Parties shall submit a copy of each arbitration opinion to the Commission, the Department of Public Service and the Office of the Attorney general, Residential and Small Business Utilities Division. The arbitrator's decision shall be remain in effect unless the Commission acts to suspend, modify, or reject the decision.*

USWC disagreed with the Department that Section 21.16 should be modified to involve the Commission in dispute resolutions. USWC contended that Commission involvement is neither appropriate nor is it necessary for the public interest. Further, USWC argued, it would be a waste of Commission resources to become involved in private disputes between the parties.

While USWC felt that no language modification is necessary, it stated that it would be helpful, if the Commission wishes to review arbitrator's decisions, to establish a time limit for such review. USWC recommended adding language that the Commission would have 45 days to suspend, modify, or reject the arbitrator's decision, as was done with the recent New-Cell/US WEST contract. Such an approach, USWC stated, would achieve finality in the parties business relationship.

The Commission agrees with the Department that the language of Section 21.16 should be modified to secure the Commission's authority to reject or modify the independent arbitrator's decision. Authority over decisions of independent arbitrators is part of the Commission's general authority to enforce interconnection agreements, consistent with the Federal Act as clarified by the 8th Circuit Court of Appeals in its recent Iowa Utilities Board decision. The Commission notes that this decision is consistent with its Orders in Docket No. P-421/EM-97-371 (the AT&T Wireless/USWC contract) and in Docket No. P-421/EM-97-1417 (the New-Cell/USWC contract) without supplanting the desire of the parties to use independent arbitrators.

The Commission further notes that in its most recent interconnection Orders, the Commission added language that the Commission would have 45 days to act to suspend, modify or reject the

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<sup>5</sup> In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b), Docket No. P-421/EM-97-371, ORDER RESOLVING ISSUES AFTER RECONSIDERATION, EXAMINING INTERCONNECTION AGREEMENT, AND REQUIRING COMPLIANCE FILING (September 29, 1997) at page 9.

decision. This language, as USWC suggested, gives the parties some certainty about the status of an arbitrator's decision and when it would be considered final or approved by the Commission.

In these circumstances, the Commission will reject the proposed language as contrary to the public interest and direct the Companies to resubmit an amended Section 21.16, incorporating the language approved in the AT&T Wireless and New-Cell Orders, including the 45 day time limit, to correct the deficiency.

#### IV. AN ADDITIONAL CONCERN

The proposed Agreement regarding assignment states:

*Neither Party may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party. . . .*

The Commission finds that this language, which does not require notice to the Commission prior to the assignment becoming effective, is contrary to the public interest, convenience and necessity. Telecommunications services are essential to the public safety and to the everyday operation of our society and economy. The Commission cannot protect the public interest in reliable service unless it can examine the fitness of prospective assignees. The Commission's decision on this issue is consistent with recent Commission decisions in other interconnection agreement proceedings. See the Commission's Order regarding the New-Cell/USWC Interconnection Agreement in which the Commission required language giving the Commission 60 days notice in advance of the effective date of an assignment.<sup>6</sup>

Accordingly, the Agreement be rejected and the Companies will be required to file revised Interconnection Agreement containing similar language on assignment to correct the deficiency.

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<sup>6</sup> In the Matter of an Application for Approval of an Agreement for Interconnection and Traffic Interchange Between New-Cell, Inc. and US WEST Communications, Inc. under the Federal Telecommunications Act of 1996, Docket No. P-421/EM-97-1417, ORDER REJECTING INTERCONNECTION AGREEMENT (December 17, 1997) at page 3. See also In the Matter of the Joint Petition of US West and WinStar Wireless of Minnesota, Inc. for Approval of an Interconnection Agreement for Service Under the Telecommunications Act of 1996, Section 252(e), Docket No. P-421,5246/M-97-1663, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILING (February 6, 1998) at page 2. See also In the Matter of an Application by U.S. Link, Inc. and US WEST Communications, Inc. for Approval of an Interconnection Agreement, Docket No. P-465,421/M-97-1316, ORDER REJECTING INTERCONNECTION AGREEMENT (November 5, 1997).

## **ORDER**

1. The Interconnection Agreement submitted by Minnesota Southern Cellular, Inc. (MSC) and US WEST Communications, Inc. (USWC) on December 29, 1997 is rejected.
2. Within two weeks of this Order, MSC and USWC (the Companies) shall file a revised Interconnection Agreement incorporating the Commission's findings of deficiencies and corrected language identified in the text of this Order.
3. If the Companies do not reach an agreement that addresses the Commission's findings of deficiencies, the Companies shall inform the Commission of that within two weeks of the Commission's Order.
4. The Executive Secretary shall have authority to examine the revised Agreement filed by the Parties, determine whether the deficiencies have been corrected as recommended, and issue a letter to the Companies approving or disapproving the revised Agreement. The Agreement shall be effective as of the date the correctly revised Agreement is filed. If the revised Agreement does not comply with the Commission's directives, Commission Staff will bring the contract back before the Commission .
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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